

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 CLARENCE JOHNSON,

10 Petitioner,

Case No. C08-1794-MJP-JPD

11 v.

12 STEVEN SINCLAIR,

13 Respondent.

REPORT AND RECOMMENDATION

14
15 Petitioner Clarence Johnson is currently incarcerated at the Washington State Penitentiary
16 in Walla Walla, Washington. He seeks habeas relief under 28 U.S.C. § 2254 from his 2004 King
17 County Superior Court conviction on one count of rape of a child in the first degree. Respondent
18 has filed a motion to dismiss the petition. Respondent argues therein that petitioner has properly
19 exhausted only three of his eleven grounds for federal habeas relief. Respondent further argues
20 that petitioner still has the opportunity to exhaust his remaining claims by filing a personal
21 restraint petition in state court before his claims become time-barred under RCW 10.73.090.
22 Respondent asserts that for this reason the petition is a mixed petition which should be dismissed
23 by this Court.

24
25 It is well established that state remedies must first be exhausted on all issues raised in a
26 federal habeas corpus petition. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. §2254(b), (c). If

1 a federal habeas petition contains both exhausted and unexhausted issues, the petition must be
2 dismissed. *Rose v. Lundy*, 455 U.S. at 522.

3 It is clear from the record that petitioner has properly exhausted some, but not all, of his
4 federal habeas claims. At the time petitioner originally filed his petition, on October 16, 2008, it
5 appears that petitioner could have returned to the state courts to present his unexhausted claims
6 through a personal restraint petition before his claims became time-barred under RCW
7 10.73.090. It does not appear that he may do so now.
8

9 RCW 10.73.090(1) provides that a petition for collateral attack on a judgment and
10 sentence in a criminal case must be filed within one year after the judgment becomes final.
11 RCW 10.73.090(3) provides that a judgment becomes final for purposes of calculating the one
12 year limitation period on the last of the following dates: (a) the date the judgment is filed with
13 the clerk of the trial court; (b) the date an appellate court issues its mandate disposing of a timely
14 direct appeal; or, (c) the date the United States Supreme Court denies a timely petition for
15 certiorari to review a decision affirming a conviction on direct appeal.
16

17 In this case, petitioner filed a timely direct appeal, but he did not file a petition for
18 certiorari. Thus, petitioner's conviction therefore became final for purposes of state law on
19 January 16, 2008, the date the Washington Court of Appeals issued its mandate disposing of his
20 direct appeal. RCW 10.73.090(3)(b). Petitioner therefore had until on or about January 16,
21 2009, to file a personal restraint petition in the state courts. Nothing in the record suggests that
22 petitioner filed any such petition. It appears clear that petitioner would now be time barred from
23 returning to the state courts to present his unexhausted claims. See RCW 10.73.090. It thus
24 appears that petitioner no longer has any state remedies available to him and that his claims are
25 therefore technically exhausted. See *Coleman v. Thompson*, 501 U.S. 722, 724 (1991).

Given that all of petitioners claims are now either properly exhausted or technically exhausted, petitioner's petition does not constitute a "mixed petition" under *Rose v. Lundy*. This Court therefore recommends that respondent's motion to dismiss be denied and that respondent be directed to file an answer to the petition. A proposed Order accompanies this Report and Recommendation.

DATED this 5th day of March, 2009.



JAMES P. DONOHUE
United States Magistrate Judge